

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 03-10306
	)	Chapter 7
THOMAS JOHN WIPF)	
Soc. Sec. No. 504-02-5081)	
Tax I.D. No. 46-0430846)	
)	
Debtor.)	
)	
)	
MARLIN HUTTERIAN BRETHREN	)	Adv. No. 03-1060
)	
Plaintiff,)	
)	
-vs-	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW RE:
THOMAS JOHN WIPF	)	P L A I N T I F F ' S
	)	NONDISCHARGEABILITY
	)	COMPLAINT UNDER § 523(a)(2)
Defendant-Third	)	AND DEFENDANT-DEBTOR'S
	)	THIRD-
Party Plaintiff,	)	PARTY COMPLAINT AGAINST
	)	CEN-DAK LEASING OF NORTH
	)	DAKOTA
)	
-vs-)	
)	
CEN-DAK LEASING OF)	
NORTH DAKOTA, INC.)	
)	
Third-Party Defendant.))	

The matter before the Court is Plaintiff Marlin Hutterian Brethren's nondischargeability complaint against Defendant-Debtor Thomas J. Wipf and Defendant-Debtor's third-party complaint against Cen-Dak Leasing of North Dakota, Inc.¹ This

¹ Cen-Dak Leasing of North Dakota, Inc.'s nondischargeability counterclaim against Defendant-Debtor was previously dismissed. A separate decision will be entered on Cen-Dak Leasing of North Dakota, Inc.'s counterclaim for replevin against Plaintiff.

is a core proceeding under 28 U.S.C. § 157(b)(2). These are the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, Plaintiff's pre-petition claim against Defendant-Debtor is declared nondischargeable under 11 U.S.C. § 523(a)(2)(A) and Defendant-Debtor shall recover nothing from Cen-Dak Leasing of North Dakota, Inc.

FINDINGS OF FACT.

1. Thomas J. Wipf ("Wipf") leased four trailers² from Cen-Dak Leasing of North Dakota, Inc. ("Cen-Dak"),³ on August 27, 2001. The trailers, two from model year 1997 and two from model year 1998, were specialty trailers designed for hauling potatoes. Though the lease term was four years and one month,⁴ Wipf, a commercial trucker, only used the trailers one month to complete a particular hauling contract.

2. Wipf returned the four trailers to Cen-Dak's trailer lot

² Wipf leased an additional six trailers at this time but these trailers are not directly involved in this nondischargeability action.

³ At the time of the lease, the trailers were not titled in Cen-Dak's name. That fact is not material to this nondischargeability action.

⁴ The leases were not typical leases but more of a credit-extension means utilized by Wipf to borrow money from Cen-Dak, where Cen-Dak in turn borrowed money from a traditional bank using the leased personalty as collateral. Wipf had entered into several such leases with Cen-Dak over the course of their business relationship.

in the autumn of 2001. Wipf had a conversation about the trailers with Cen-Dak's manager, Dennis Paulsrud. Paulsrud told Wipf that he (Paulsrud) would like to find a buyer for the trailers. Paulsrud did not authorize Wipf to sell the trailers in Wipf's name. Paulsrud did not promise Wipf that Cen-Dak would transfer title to any buyer that Wipf might locate.

3. Through family contacts, Wipf learned that the Marlin Hutterian Brethren, a Hutterite family farming colony from Washington state, ("Marlin Colony") might be interested in the trailers. In late 2001, Wipf contacted the Marlin Colony through their secretary, Peter S. Gross, and arranged for Gross to inspect the trailers.

4. After Gross personally inspected one trailer, he and Wipf struck a final deal in early 2002. For the two 1998 potato trailers, the Marlin Colony would give Wipf \$10,000 down, a trade of a 1988 Trinity Eagle trailer valued at \$20,000, and a final payment of \$40,000 by September 1, 2002. Wipf indicated to Gross that he owned the trailers; Gross understood that the Marlin Colony was purchasing the trailers from Wipf's trucking company, T&A Trucking.

5. Wipf removed the two 1998 trailers from Cen-Dak's trailer lot without Cen-Dak's knowledge or permission, though

Paulsrud ultimately suspected that Wipf had them. At the time the trailers were removed from the lot, the trailers were already licensed for 2002.

6. The Marlin Colony gave Wipf \$10,000 and possession of and title to the Eagle trailer around February 4, 2002, when Wipf's representative, James Wipf, delivered the first potato trailer to the Colony in Washington state. James Wipf delivered the second potato trailer to the Marlin Colony a few weeks later.

7. Wipf advised Gross that he would not be immediately able to give the Marlin Colony title to the trailers. Gross was concerned that a law enforcement officer might question the North Dakota plates on the trailers. To calm that concern, Wipf created two written agreements that said the Marlin Colony was leasing the trailers from T&A Trucking, Inc. These lease agreements were dated February 5, 2002, and were signed by Wipf, Wipf's wife Amy, and Gross.

8. Wipf delivered the Eagle trailer to Cen-Dak after he brought the trailer from Washington state to North Dakota. Rather than telling Paulsrud that the Eagle trailer was partial compensation for the two 1998 potato trailers that the Marlin Colony had purchased, Wipf led Paulsrud to believe that he

(Wipf) owned the Eagle trailer. Paulsrud found a buyer/lessee for the Eagle trailer. On February 26, 2002, Wipf issued a bill of sale for the Eagle trailer to Cen-Dak's buyer/lessee. Cen-Dak gave Wipf \$19,000 for the Eagle trailer on March 1, 2002.

9. Though Gross continued to be concerned about Wipf's failure to give the Marlin Colony titles to the two 1998 potato trailers, Gross made the final \$40,000 payment to Wipf, through a check made out to T&A Trucking, on September 18, 2002.

10. Gross continued to contact Wipf or Wipf's wife in an effort to get the titles to the two 1998 potato trailers. To permit the Marlin Colony to use the trailers for the 2003 harvest season, Wipf worked with Cen-Dak to get 2003 license tags for the trailers. Cen-Dak understood that Wipf was using the trailers.

11. Wipf filed a Chapter 13 petition in bankruptcy on August 19, 2003. He converted his case to a Chapter 7 case on August 20, 2003. Wipf scheduled Cen-Dak as a partially secured creditor with a claim of \$300,000, and as an unsecured creditor with a claim of \$2,500,000. He scheduled the Marlin Colony and Peter Gross and Jake Gross as unsecured creditors for unknown amounts.

12. Peter Gross did not learn that Wipf might not own the

two potato trailers until his attorney reviewed Wipf's bankruptcy schedules.

13. The Marlin Colony timely filed a nondischargeability complaint against Wipf arising from Wipf's failure to produce a clear title to the two 1998 trailers for which it had paid him. Wipf answered the complaint with a general denial and, based on his allegation that Cen-Dak had authorized him to sell the trailers and then had refused to give him the titles, Wipf brought a third-party complaint against Cen-Dak asking that Cen-Dak be required to hold him harmless from any recovery that the Marlin Colony may make. Cen-Dak answered saying it had not been compensated for the trailers the Marlin Colony paid for and that Wipf did not have authority to sell the trailers. Cen-Dak counterclaimed against Wipf seeking a determination that its large claim against him was nondischargeable. This counterclaim was dismissed as untimely. Eventually, Cen-Dak, with the Marlin Colony's consent and to bring all issues before one court, filed a counterclaim for replevin against the Marlin Colony in an effort to regain possession of the two 1998 trailers.⁵ The Marlin Colony did not answer the counterclaim. Cen-Dak's motion

⁵ Cen-Dak's counterclaim for replevin is addressed in a separate letter decision and order.

for summary judgment on the counterclaim was denied by agreement of the parties.

14. A trial was held September 9, 2004. These findings are based on the exhibits received and the testimony heard.

APPLICABLE LAW.

A debt for money, property, services, or an extension or renewal of credit is excepted from discharge under § 523(a)(2)(A) to the extent it was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." As § 523(a)(2)(A) is interpreted by case law, the party opposing discharge must show that:

1. the debtor made a representation;
2. at the time made, the debtor knew the representation to be false;
3. the representations were made with the intention and purpose of deceiving the creditor;
4. the creditor justifiably relied on the representation; and
5. the creditor sustained a loss as a proximate result of the representation having been made.

Burt v. Maurer (In re Maurer), 256 B.R. 495, 500 (B.A.P. 8th Cir. 2000); see *Field v. Mans*, 116 S.Ct. 437 (1995)(discussion of justifiable reliance); *Caspers v. Van Horne (In re Van*

Horne), 823 F.2d 1285, 1287 (8th Cir. 1987); *Thul v. Ophaug (In re Ophaug)*, 827 F.2d 340 (8th Cir. 1987); *Universal Bank v. Grause (In re Grause)*, 245 B.R. 95, 99 (B.A.P. 8th Cir. 2000); see *Alport v. Ritter (In re Alport)*, 144 F.3d 1163, 1166-67 (8th Cir. 1998)(application of § 523(a)(2)(A)). The party opposing discharge has the burden of proving the debt is nondischargeable by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991). The statutory exceptions to discharge are narrowly construed. *Werner v. Hofmann*, 5 F.3d 1170, 1172 (8th Cir. 1993).

Nature of the falsity. To fall within the scope of § 523(a)(2)(A), the false representation or false pretense must generally relate to a present or past fact. *Shea v. Shea (In re Shea)*, 221 B.R. 491, 496 (Bankr. D. Minn. 1998)(cites therein). The falsity can be based on any type of conduct that is calculated by the debtor to convey a misleading impression. *Minnesota Client Security Board v. Wyant (In re Wyant)*, 236 B.R. 684, 695 (Bankr. D. Minn. 1999). It may include silence or the concealment of a material fact. *Id.*

Intent. The debtor's intent need not be one of malevolence or ill will. *Merchants National Bank of Winona v. Moen (In re Moen)*, 238 B.R. 785, 795 (B.A.P. 8th Cir. 1999). All that the

creditor must show is that the debtor intended to induce the creditor to rely and act on the misrepresentation. *Id.*

Evidence of the surrounding circumstances may be presented from which intent may be inferred. *Van Horne*, 823 F.2d at 1287 (cites therein). The debtor may then be required to overcome this circumstantial evidence with more than unsupported assertions of honest intent. *Id.* at 1287-88 (cites therein); see *Alport v. Ritter (In re Alport)*, 144 F.3d 1163, 1166-67 (8th Cir. 1998).

Reliance. The creditor must have *justifiably* relied on the debtor's representations. *Field*, 116 S.Ct. at 444-46. Justifiable reliance requires the Court to consider the particular plaintiff - his knowledge and his intelligence -- and the circumstances of the particular case. *Id.* at 444. The Court must ask whether the plaintiff had knowledge of facts that should have warned him that he is being deceived and that he needs to make further investigation. *Id.* A person is justified in relying on a factual representation without conducting an investigation, so long as the falsity of the representation would not be patent upon cursory examination. *Id.* If, however, there are obvious or known falsities, either in the debtor's conduct, the nature of the transaction, or in

documents, the creditor has not justifiably relied on the debtor's misrepresentation. *Guske v. Guske (In re Guske)*, 243 B.R. 359, 363-64 (B.A.P. 8th Cir. 2000).

CONCLUSIONS OF LAW.

1. Wipf represented to the Marlin Colony that he owned the two 1998 potato trailers that he sold to the colony.

2. At the time Wipf made this representation, he knew that he did not own the trailers and had been, at most, a lessee of the trailers.

3. Wipf was not authorized by Cen-Dak to represent that he owned the trailers.

4. Wipf intended to deceive the Marlin Colony through his representation.

5. The Marlin Colony justifiably relied on Wipf's representation; there were no obvious or known falsities, either in Wipf's conduct, the nature of the sale, or in documents related to the transaction that would have warned the Colony that Wipf would be unable to produce the trailer titles.

6. The Marlin Colony sustained a loss as a proximate result of Wipf's false representation. That loss sustained was the \$50,000 in funds that the colony paid Wipf, through his trucking company, for the two trailers and the \$20,000 value of the Eagle

trailer that was given in trade. Thus, the total loss sustained was \$70,000. That loss is nondischargeable under 11 U.S.C. § 523(a)(2)(A).

7. Cen-Dak has no obligation to hold Wipf harmless for the nondischargeable debt he has incurred with the Marlin Colony. It did not make any commitment regarding the trailers to Wipf or assume any obligation to transfer the titles to any buyer that Wipf might find.

8. A judgment will be entered declaring the Marlin Colony's claim against Wipf for \$70,000 nondischargeable under § 523(a)(2)(A) and dismissing Wipf's third-party complaint against Cen-Dak.

Dated this 27th day of October, 2004.

BY THE COURT:
/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: /s/ Alta O. Otterness
Deputy Clerk